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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 515

UNITED STATES OF AMERICA, PETITIONER

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Claims (App. 68–129) is reported at 423 F. 2d 346. The opinions of the Indian Claims Commission (App. 24–56, 60–67) are reported at 17 Ind. Cl. Comm. 28 (May 6, 1966) and 21 Ind. Cl. Comm. 268 (additional findings of fact, June 27, 1969).

JURISDICTION

The decision of the Court of Claims was issued on March 20, 1970 (App. 68). On June 10, 1970, the Chief Justice extended the time for filing a petition for a writ of certiorari to August 2, 1970, and on July 29, 1970, he further extended the time for filing the peti-

tion until August 10, 1970. The petition was filed on August 10, 1970, and granted on November 16, 1970 (App. 147). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Indian Claims Commission has jurisdiction under 25 U.S.C. 70 to entertain a claim filed in 1963 for a general accounting, brought up to date, of funds unrelated to any claims timely filed and pending before the Commission.

2. Whether a settlement agreement reduced to judgment as to an Indian tribe's claims regarding land and property ceded to the United States by a specified Act of Congress bound the tribe as to a tract of land ceded both in that Act and, when the tribe failed to honor its obligations, by a subsequent Act of Congress.

STATUTES INVOLVED

The Indian Claims Commission Act, 60 Stat. 1049, 1050, 25 U.S.C. 70a, provides in pertinent part:

> Sec. 2. * * * No claim accruing after August 13, 1946, shall be considered by the Commission.

Section 12, 25 U.S.C. 70k, provides:

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

Section 24, as amended by the Act of May 24, 1949, 63 Stat. 102, 28 U.S.C. 1505, provides:

> The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws, or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

Relevant provisions of the Act of June 15, 1880, 21 Stat. 199, and the Act of February 20, 1895, 28 Stat. 677, are set out in the Appendix to this brief.

STATEMENT

This case arises out of a suit filed by the Southern Ute Tribe or Band of Indians before the Indian Claims Commission seeking compensation for the government's failure to fulfill its obligations to the Tribe. To the extent that it presents issues of *res judicata*, it requires summary of a long and complex history of relationships and litigation, a history set out in greater detail in the opinions in the Court of Claims. (App. 68) The issues concerning the Tribe's belated demand for a general accounting, on the other hand, require an understanding only of the chronology of this suit, and its relationship to the limits Congress has imposed on the jurisdiction of the Commission.

413-291—71——2

I. HISTORICAL BACKGROUND RELATING TO THE *RES JUDICATA* ISSUE

A. AGREEMENTS RELATING TO THE RESERVATION

The Southern Ute Tribe or Band of Indians is one of a number of bands of Ute Indians which, collectively and for convenience, were called the Confederated Band of Ute Indians.[1] Initially inhabitants of New Mexico, the Confederated Band was prevailed upon after the Mexican Cession to accept a large rectangular area in western Colorado as a reservation. Treaty of March 2, 1868, 15 Stat. 619. One of the constituent tribes, the White River Utes, roamed the northern part of the reservation, near an Indian agency at Meeker; the Uncompahgre Utes inhabited the central area, and the Southern Utes, the southern tier. The reservation was undivided, however, and agreements about it were made with the Confederated Band as a whole. The treaty provided that a three-fourths vote of the male members of the entire Band was required to ratify any change in its terms. 15 Stat. 622.

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[1] The Southern Utes, themselves, are composed of constituent bands. During most of the time relevant here, there were three such bands—the Moache, the Capote and the Weeminuche—and congressional references to the Southern Utes invariably mean all three. The Weeminuche (also known as the Ute Mountain Utes) live to the west of the Moache and Capote, however, in lands not subject to the disputes in this case, and only the latter two bands brought this action as "the Southern Ute Tribe or Band." The government sought dismissal below for failure to join the Weeminuche, allegedly an interested party. See n. 13, *infra*. The Court of Claims' rejection of that contention, App. 89, was not challenged in the government's petition for certiorari.

One such change occurred in 1874, after gold had been found in the east-central part of the reservation. For a stated consideration, which was not promptly paid,[2] the Confederated Band ceded back approximately one fourth of the reservation. Act of April 29, 1874, 18 Stat. 36. The effect of this cession was to isolate the Southern Utes somewhat from the other tribes. It left a strip of reservation fifteen miles wide along the southern boundary and a strip twenty miles wide along the western boundary joining the southern strip to the much larger northern area. In 1896, the southern strip was identified as Area 617 and the northern part as Area 616 on a map of Indian land cessions drawn by Charles Royce in connection with a published study, *Indian Land Cessions,* 18th Ann. Rep., B.A.E. 1896–1897, Part II, and the areas are frequently referred to in the opinions and papers in this case as Royce Area 617 and 616. No such areas were created by or referred to in the Act of 1874, however; it was an agreement with the Confederated Band as a whole, and dealt with the whole of their reservation.

In 1879, whether because of impatience with promises not kept, incursions by settlers and miners into their reservation, or the farming of land they wanted for horse-pasture, the Utes went to war in the northern part of the reservation, massacring the male inhabitants of the Meeker agency. This produced a great

[2] This cession was the subject of a claim before the Indian Claims Commission, *Confederated Bands of Ute Indians* v. *United States*, 11 Ind. Cl. Comm. 180 (1962), and resulted in a new judgment, after offsets, of $7,908,586.16. (14 Ind. Cl. Comm. 679, 705 (1965)).

outcry in the United States and—together with the pressure for land and a general impatience with "solutions" to the Indian problem which sought to give Indians enough land to remain in their aboriginal state—led to the proposal by the United States of an agreement to eliminate, completely, the existing reservation, See, *e.g.*, 10 Cong. Rec. 2027–2030, 2058–2067, 2121–2130. The northern, White River Utes, believed chiefly responsible for the massacre, were to be moved to agricultural lands in an existing reservation in Utah. The Uncompahgres were to settle on agricultural lands at the junction of the Gunnison and Colorado (then called the Grand) Rivers in Colorado, or in Utah if there was not enough land at that location. The Southern Utes were to settle upon agricultural lands on the La Plata River, which ran southward through the western part of their area of the reservation, either in the former reservation or in New Mexico if reservation lands proved insufficient.

It was central to the new scheme that none of this land was to be held triballly; it was all to be allotted in severalty to individual Indians. The Utes were to agree "to cede to the United States all the territory of the present Ute Reservation in Colorado, except as [thus] provided for their settlement." (21 Stat. 200) Once the allotments for settlement were made, "all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, *released and conveyed to the United States,* shall be held and deemed to be public lands of the United States and subject to disposal"

under conditions promising financial benefit to the Utes. (21 Stat. 203; emphasis added.)

This was, essentially, a forced sale of the reservation; it was adopted by the United States by the Act of June 15, 1880, 21 Stat. 199. The United States' failure thereafter to observe the terms on which the Utes sold the reservation has been the cause of the several lawsuits brought by the Confederated Band. But it was clear until the present suit that the Southern Utes were not specially treated by the agreement and Act. As one of the Confederated Band, they ceded the reservation to the United States in return for the promise (a) of allotment of agricultural lands to individual members of the tribe, in severalty; (b) a share in the proceeds of any former reservation lands thereafter sold to the public; and (c) the fixed annuities established or continued by the Act. Throughout the lengthy and heated debates over the measure[3]—strongly resisted by those who knew that the Indians were not ready for settled, agricultural life and viewed the measure as excessively punitive—there is no hint that the Southern Utes were being treated differently in this regard, that there was more than one Ute Reservation, or that any of the Utes would be permitted a reservation life thereafter.

The Act called for restoration of the reservation lands to public land status *after* the required allotments in severalty had been made. By 1882 the White

[3] The Senate debates are set out at 10 Cong. Rec. 2027–2030, 2058–2067, 2121–2130, 2152–2164, 2189–2202, 2221–2228, 2249–2268, 2300–2320; the House debates, at 10 Cong. Rec. 4251–4263; see also 10 Cong. Rec. 176–185.

River Utes had been moved to Utah and, when no suitable lands could be found at the mouth of the Gunnison and a new uprising threatened, the Uncompahgre Utes had also been taken there. The northern part of the former reservation was thus vacant, and no longer subject to the necessity of allotment. In order to open it to public entry while reserving the southern part of the former reservation for the allotments to individual Southern Utes that had not yet been made, Congress enacted the Act of July 28, 1882, 22 Stat. 178. The Act provided for the surveying of a line dividing the southern from the northern part of the former reservation, and opened the latter to immediate settlement. Nothing in the scanty debates and reports regarding the measure suggests any new purpose to give the Southern Utes a reservation or to recognize that they continued to possess one. 13 Cong. Rec. 1659 (1882); S. Rep. No. 186, 47th Cong., 1st Sess.; H. Rep. Nos. 561, 1304, 47th Cong. 1st Sess.

Over time, as the Southern Utes continued to resist taking individual allotments, it became apparent that they were not, indeed, ready for the settled agricultural life contemplated by the Act of 1880. In 1888, 25 Stat. 133, the Secretary of the Interior was authorized to appoint a commission to negotiate with the Southern Utes for a modification of the 1880 agreement. The Tribe agreed to give up its rights in its former reservation to remove and settle upon a reservation in Utah. In 1895, however, Congress annulled this agreement (which had never been ratified) in a statute, the Act of February 20, 1895, 28 Stat.

677, which expressly required that "the [Act of June 15, 1880] be carried out as therein provided, and as further provided by general laws for settling Indians in severalty." The House Report on the measure, No. 799, 53d Cong., 2d Sess., explained that it was intended to remedy the Indians' "anomalous condition of having ceded their reservation and yet remaining upon it." At 2; see also, S. Rep. No. 279, 53d Cong., 2d Sess., 2, 3–4.

The 1895 Act created, for the first time, a Southern Ute Reservation. It was located in the western part of their former area and a small adjoining area of northern New Mexico. Agricultural lands might be allotted to individual Utes from the remainder of the former area—but not, as previously, to all members of the tribe; agricultural lands were to be allotted only to those whom the Secretary considered qualified, and they retained their rights in the western, tribal lands. All allotments were to be made within six months, and land neither allotted nor set aside in the newly created reservation was to be sold for the benefit of the tribe. Although all previous Acts had honored the provision of the 1868 Treaty requiring three-fourths approval by the male members of the Confederated Band, and all prior changes had received such approval, this Act provided for approval by only a majority of the members of the Southern Ute Tribe or Band. 28 Stat. 679.

The allotment impass which had followed the 1880 Act was thus brought to an end, and much of the land which had previously been expected to become

public lands in fact became so. Little was purchased, however, and when in 1938 the unoccupied public lands in the southern strip were returned to tribal ownership, a substantial proportion of the pre-1880 reservation Southern Ute lands was restored.

B. LITIGATION TO ENFORCE THE GOVERNMENT'S OBLIGATIONS TO THE CONFEDERATED BAND

Although both the Act of 1880 and the Act of 1895 provided specifically that the lands of the former Ute Reservation were to be sold for the benefit of the Utes, Congress opened the land to free homesteading, and the government in other respects failed to protect the Indians' rights. Later concern for these failures led to the passage of a number of special acts permitting the Confederated Band and its constituent tribes to sue the government for damages. Several actions were filed, and in all of them, until the present suit, both the attorneys for the Indians and the courts involved viewed the 1880 Act as having ceded the entire Ute Reservation then existing. Accordingly, the Southern Utes—who had resided almost exclusively in the southern strip—were parties to those suits and shared in the judgments obtained.

The first such action was brought by the Confederated Band in 1910. *The Ute Indians* v. *United States*, 45 Ct. Cl. 440. It included claims for the fifteen-mile wide southern strip as well as for the remainder of the reservation, and approximately 5 percent of the 3.4 million dollar judgment obtained represented payment for those claims. The Southern Utes were party to that litigation as one of the Confederated Band; the court

agreed with their contention that the claims for southern strip lands could be heard, although the jurisdictional act referred only to the Act of 1880, because the lands covered by the Act of 1895 are also embraced within the cession of 1880 (App. 110). By the Act of 1880, the court said, the Confederated Band "ceded to the United States the entire remainder of their reservation" after the prescribed allotments in severalty were made. 45 Ct. Claims at 459.

The Confederated Band was before the Court of Claims again in 1943, this time with regard only to lands from the northern area of their former reservation. *Confederated Bands of Ute Indians* v. *United States,* 100 Ct. Claims 413. Again, the Act of 1880 was regarded as having ceded the entire Ute Reservation, after individual allotments, to the United States. *Id.* at 421.

In 1946, the Confederated Band brought another claim before this Court. *Confederated Bands of Ute Indians* v. *United States,* 330 U.S. 169. It was represented in that case by the present counsel for the Southern Utes, and the Southern Utes were a party. Counsel alleged in the Band's complaint and emphatically and repeatedly stressed in this Court that the Act of 1880 had ceded to the government *all* the Band's Colorado lands with the exception of agricultural lands for individual allotment under that Act. No. 141, O.T., 1946, R. 3 (complaint); Pet. 4, 6–7; Pet. Br. 8–9, 15–16, esp. n. 4, 23, 24 n. 6. In the Act of 1880, counsel said, the "parties were dealing with respect to the total lands that the Indians then

possessed." Pet. Rep. Br. 8. These repeated remarks were made in another context, to be sure, but that does not detract from their pertinence as an understanding of what the Act of 1880 had done. The government acknowledged their correctness, Resp. Br. 13, 34–35, 37–38, and so did this Court. 330 U.S. at 174.

Just one year earlier, in 1945, present counsel had filed still another suit on behalf of the Confederated Band against the government for its failure to honor its obligations under the Act of 1880. This Court noted that it was conceded that the 1945 suit, already filed, presented the Band's claims for the entire area of their prior reservation. 330 U.S. at 175, 176. As Chief Judge Cowen points out in his dissent below in this case, App. 125–126, 127–129, the Band's 1945 complaint again acknowledged that the whole of the previous Ute reservation had been ceded to the government by the Act of 1880 (save for such lands as might be individually allotted), and the allegations of the complaint were broad enough to include the lands in issue here. The Southern Utes, whose interest was then and is now restricted to the lands in issue here, were party to that suit and took a forty percent share of the judgment. As Judge Skelton points out in his dissent below, App. 105, the accountings which formed the basis for settlement of the 1945 suit included moneys arising from the lands in issue here.

The Confederated Band of Ute Indians, including the Southern Utes, settled the 1945 suit, together with several others, for an aggregate judgment of almost thirty-two million dollars. The settlement agreement included a schedule of lands drawn up by the Band's

attorneys (App. 99; 117 Ct. Cl. 433, 437), and expressly provided:

> So far as the parties with diligence have been able to determine these descriptions represent all the land so disposed of and set aside. However, the judgment to be entered in this case is *res judicata,* not only as to the land described in Schedule 1, but, whether included therein or not, also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and by the defendant during the aforesaid periods of time sold for cash, disposed of as free homesteads and set aside for public purposes.

The Southern Utes, along with the other tribes, thus released and settled any claims they might have had to lands in western Colorado, insofar as those lands were ceded to the government by the Act of June 15, 1880. The settlement was approved and adopted by the Court of Claims. 117 Ct. Cl. 433. Again, in 1951, in a suit to determine present counsel's fee for its services in the actions resulting in this consent decree, the Court of Claims made plain its understanding, on which it had approved the previous settlements: "In 1880 the Indians ceded to the United States the remainder of the reservation, containing 12,000,000 acres."[4] *Confederated Bands of Ute Indians* v. *United States,* 120 Ct. Cl. 609, 623.

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[4] The original reservation was less than 16,000,000 acres; the withdrawal of 1874 had been of 3,700,000 acres. Thus, the 12,000,000 acre figure necessarily includes the 1,000,000 acre southern strip.

II. THE PRESENT LITIGATION

On August 10, 1951, the two tribes styling themselves the Southern Ute Tribe or Band, see n. 1 *supra*, filed the present claim before the Indian Claims Commission under the Indian Claims Commission Act of 1946. They sought recovery on two bases: damages or compensation for disposition as "free homesteads" of approximately 220,000 acres which both the Act of 1880 and the Act of 1895 obligated the Secretary of the Interior to sell for the Indians' benefit; and damages for failure to account for the proceeds from the sale of approximately 82,000 acres—proceeds which, again, under both statutes were to be held for the Indians' benefit. The government answered, *inter alia*, that these were lands "formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880," and that thus any claim as to them had been compromised by the 1950 settlement.

On August 13, 1951, three days after these claims were filed, the statutory time limit for filing new claims with the Commission finally expired. 25 U.S.C. 70k. In 1953, in response to the Tribe's request for an accounting for the proceeds from sale of approximately 82,000 acres of land, the government presented to the attorneys for the Tribe a General Accounting Office report which included a statement of proceeds derived from the sale of certain lands pursuant to the Act of 1895, together with an accounting of the interest on these proceeds during the period from February 12, 1929, to June 30, 1951. On June 12,

1963, the Tribe filed "exceptions" to the accounting report; on September 30, 1963, it filed amended "exceptions" in which, for the first time, the Tribe alleged an accounting claim directed to tribal funds generally, including matters unrelated to the original claims filed in 1951, and demanded an extension of the accounting report "up to date." 17 Ind. Cl. Comm. 53 (App. 19–20, 22, 45–46).

On May 6, 1966, the Indian Claims Commission rendered its findings of fact and opinion, 17 Ind. Cl. Comm. 28 (App. 24), in which it held that the government was liable to the Tribe for "just compensation" for 230,547.44 acres of land disposed of from its reservation without the payment of compensation, and further held that the Tribe was entitled to a general accounting and that the accounting should be brought up to date. On March 20, 1970, the Court of Claims affirmed (Chief Judge Cowen and Judge Skelton dissenting), 423 F. 2d. 346 (App. 68).

With respect to the effect of the 1950 consent decree, both the Commission and the Court of Claims concluded that the lands in question here were not "effectively" ceded in 1880—although apparently so—and that the settlement agreement was limited to those lands "effectively" ceded rather than all lands identified as ceded by the Act (App. 88). Thus, they rejected the government's *res judicata* defense. As to the accounting claim, the Commission held that the limitations period did not begin to run until the Indians received the accounting report,

since they could not have known until then whether they had any claim (App. 46). The Court of Claims agreed that the request for a general accounting was timely, but on the ground that the "exceptions" were merely amendments which related back to the filing of the original claim (App. 95).

SUMMARY OF ARGUMENT

I

All claims in this case are *res judicata*. They were the subject of a settlement reached between the government and the Confederated Band of Ute Indians, including the Southern Ute Tribe or Band of Indians, in 1950. The settlement agreement stated in terms that the judgment to be entered upon it would be "res judicata * * * as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880." The lands which are the subject of this law suit are among the lands that were ceded to the United States by the Confederated Band of Ute Indians by the Act of June 15, 1880.

As a historical matter, that cession could not be denied. It appears in the language of the Act, and throughout the heated legislative debates. At the time, there was only a single Ute Reservation, and under the terms of the statute all of it was to be ceded to the United States except those lands, not exceeding 700,000 acres in extent, which might be allotted in severalty to individual Indians for agricultural use. The tribal lands were to be entirely extinguished.

The cession of 1880 was the only effective cession of these lands. While a subsequent Act, the Act of 1895, revised the terms of the agreement somewhat and created for the first time a Southern Ute Reservation, that Act neither purported to nor could effect any cession of these lands. The conditions required by a previous treaty for cession were not met; the legislative history of the 1895 Act specifically recognizes the previous cession as having been made, and indicates that the statute was intended to remedy the anomalous situation which resulted when the Southern Utes nonetheless remained on the reservation; and the Act itself is styled as one "to carry out the provisions of the treaty" of 1880 and includes no words of cession.

Nor could it be believed that in 1950 counsel would have thought that a reference to land "ceded to defendant by the Act of June 15, 1880," would not be taken to include the land at issue in this case. Until this suit was filed, three days before the closing of the Indian Claims' Commission docket, both the courts and concerned attorneys were unanimous that the Act of 1880 had ceded the whole of the Ute Reservation, including these lands. In 1947, present counsel for the Southern Utes, who also represented the Confederated Band in the settlement negotiations, had repeatedly and emphatically stated to this Court that the 1880 cession was a cession of the entire Ute Reservation; and this Court had responded by noting that the litigation which resulted in the 1950 settlement, then pending in the Court of Claims, sought to settle

all claims for lands contained within the true boundaries of the prior reservation. In light of all this, it was improper to go behind the plain words of the settlement agreement to find that the parties had nonetheless meant to exclude these lands from the stipulation. The lands were ceded to the United States in 1880, and thus the judgment of 1950 is *res judicata* as to them.

II

A. The jurisdiction of the Indian Claims Commission is limited to claims filed on or before August 13, 1951. Insofar as it demanded an accounting for tribal funds, the petition of the Southern Ute Tribe filed before that date was limited to the proceeds from the sale of 82,000 acres of land. Accordingly, the exceptions subsequently filed seeking an accounting of other funds—notably, a tribal fund called "Proceeds of Labor"—are untimely and ought not to have been entertained. The time limitation of the statute is jurisdictional, since the Act is a waiver of sovereign immunity. Moreover, it is clear from the legislative history both of the Act and of subsequent extensions that that limitation is one which Congress has particularly insisted upon.

Nor can it properly be said that a claim for an accounting on the "Proceeds of Labor" fund relates back to the claim for an accounting of the proceeds from the sale of 82,000 acres of land. Whether or not the claim was suggested by the accounting the government made in response to the initial request—an accounting made in 1953, 10 years before the filing of these exceptions—the claim was in no way suggested

by what the Band had demanded before the running of the period of limitation. Only the latter consideration could be the test of whether respondent's new claims relate back to its earlier finding.

B. Similarly, the authority of the Indian Claims Commission is limited to claims accruing before August 13, 1946. In response to the demand for an accounting, the government in fact filed an accounting up to June 30, 1951, as has been its invariable practice in these cases. But respondent by exception has now demanded an extension of that accounting down to the present. An accounting for the government's handling of respondent's money during the period 1951–1970 cannot be thought even remotely connected to claims which may have accrued before 1946. The purpose of an accounting is not simply to provide an appropriate remedy for wrongs which may have been done at an earlier time, but to expose additional mishandling of funds. Under the statute, jurisdiction over any government mismanagement of tribal funds after August 13, 1946, is exclusively in the Court of Claims.

ARGUMENT

I. ALL CLAIMS IN THIS CASE ARE BARRED AS *RES JUDICATA* SINCE THEY RELATE TO LAND "FORMERLY OWNED OR CLAIMED BY [THE CONFEDERATED BAND OF UTES] IN WESTERN COLORADO, CEDED TO THE DEFENDANT BY THE ACT OF JUNE 15, 1880," AND THUS WERE SUBJECT TO A FINAL SETTLEMENT, TO WHICH RESPONDENT WAS A PARTY, MADE IN 1950

Respondent was a party to consent judgments entered on July 13, 1950, for an aggregate of more than thirty million dollars in settlement of various

claims made by the Confederated Band of Ute Indians. 117 Ct. Cl. 433. The tribes constituting the Southern Ute Band, as it was known in 1880 and 1895, see n. 1 *supra,* received forty per cent of those judgments. One of the settlement agreements, for more than six million dollars, recites (App. 99) *inter alia,* that—

> the judgment to be entered in this case is res judicata, not only as to the land described in [a schedule prepared by counsel for the Confederated Band], but whether included therein or not, also as to any land formerly owned or claimed by the plaintiffs in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199), and by the defendant * * * sold for cash, disposed of as free homesteads and set aside for public purposes. * * *

The Court of Claims held in the present case that this settlement included no amounts attributable to the southern strip of the former Ute Reservation and was not *res judicata* as to claims regarding lands in that strip, because those lands were not "ceded to defendant by the Act of June 15, 1880."

A. THE ENTIRE UTE RESERVATION, INCLUDING ITS SOUTHERN PART, WAS "CEDED TO DEFENDANT BY THE ACT OF JUNE 15, 1880"

We have set out in some detail in the Statement, *supra,* pp. 4–10, a history of the Ute Reservation. Without repeating that history here, it should be evident that the Act of 1880 involved a cession of the entire Ute Reservation to the United States. There was but a single, undifferentiated Ute Reservation at the time, and the Act nowhere indicates that one part of it

might be continued in reservation status. The only lands which were not to be ceded under the Act were those lands—not possibly more than 700,000 acres in extent for the *whole* of the Confederated Band, H. Rep. No. 1401, 46th Cong., 2d Sess. 7; 10 Cong. Rec. 2066—which were to be allotted to *individual* Ute Indians in severalty for agricultural purposes. The plain purpose of the bitterly fought Act, and in large part the reason for the disputation over it, was to end reservation life for the Utes. Tribal lands were to be completely extinguished.

In indicating where the allotments were to be made, Congress distinguished among the several tribes. The White River Utes, believed principally responsible for the massacre at Meeker, were to be banished to Utah; the Uncompahgre might have their allotments within the former reservation, at the mouth of the Gunnison, if there was sufficient land; and the Southern Utes were to receive their allotments along the La Plata River in Colorado and New Mexico. But, again, these allotments were restricted to homestead size and to individual Indians; no one suggested that the Southern Utes would be able to preserve the entire southern strip of the reservation under a different name. Indeed, the legislative history suggests a belief that few of them would remain in Colorado, as the La Plata in that state is a small stream with only limited agricultural lands beside it. H. Rep. No. 1401, *supra,* 9. The Senate would have sent them all to New Mexico; the House would have had them all remain in Colorado; and the compromise reached was that they would stay by the La Plata in Colorado

if there proved to be enough agricultural land for allotment there. 10 Cong. Rec. 4465.

The Act provided that allotments were to be made before public sales of the land began. Once the northern areas of the former reservation had been vacated by the removal of the White River and Uncompahgre Utes, ending any need for allotments there, there was pressure to open those lands up, while preserving the southern part for the allotments which had not yet occurred. It was this pressure that led to the Act of 1882, providing for the surveying of a line between the two areas. No one suggested that the southern area had not also been ceded; the legislative history is all to the contrary. As a practical matter a distinction had to be made in order to know which lands had to be preserved against the continuing possibility of allotment to the Southern Utes under the 1880 Act. H. Rep. No. 799, 53d Cong., 2d Sess. 2; S. Rep. No. 279, 53d Cong., 2d Sess., 2, 3–4.

B. THE SOUTHERN PART OF THE UTE RESERVATION WAS EFFECTIVELY CEDED TO THE UNITED STATES BY THE ACT OF JUNE 15, 1880

Recognizing the inevitability of the conclusion that the Confederated Band ceded the southern strip along with the rest of its reservation in 1880, the Court of Claims concluded that that cession had not been "effective." To the contrary, it was the only effective cession there was.

When the Ute Reservation was created by treaty in 1868, it was expressly required that any change in the Reservation, such as a cession, must be approved by three fourths of the males of the entire Confed-

erated Band. The cession of 1880 was so approved, and thus was effective as a change of the prior agreement. The Act of 1895, which the court below viewed as being the "effective" cession (App. 85), contained no such provision for approval. It provided only for approval of the changes it introduced by a majority of the males, of the Southern Utes only (*supra*, p. 9). While we view the resulting changes as valid, because they improved the position of the Southern Utes from what it had been under the Act of 1880, those changes could not have been a valid cession of the Band's treaty reservation lands.

Indeed, the form of the statute and its legislative history, on the whole, support the conclusion that in the Act of 1895 Congress started from the proposition that an effective cession of the reservation lands had been made in 1880. The committee reports in both the House and the Senate characterize the 1880 agreement as one in which the Confederated Band "ceded the whole of their reservation in Colorado to the United States, except such lands, if any, as might be allotted to them in severalty." H. Rep. No. 799, 53d Cong. 2d Sess., 2; S. Rep. No. 279, 53d Cong., 2d Sess., 2. Observing that allotments had never been made to the Southern Utes and that in fact they did not want them—being uninterested in agriculture and unwilling to break with tribal ownership patterns—the reports recommended the creation of a new reservation, embodying lands more extensive than would have been possessed by the tribe as a whole had the allotments been made, while still permitting allotments to those who wished to, and would, engage in farming. The

Southern Utes were said to be "in the anomalous condition of having ceded their reservation and yet remaining on it." *Ibid.*

Accordingly, the Act of 1895 was styled as one "to carry out the provisions of the treaty" of 1880, and in its opening words directs that that treaty "be carried out." 28 Stat. 677. Definite time limits were then placed, for the first time, on the making of allotments and the United States dedicated some of its lands—which it could be assumed would have reverted to public ownership after the making of allotments under the Act of 1880—to the creation of a new reservation for those who did not receive allotments. The Act nowhere states that the Southern Utes made any cession thereby; and, indeed, for the reasons stated, they had no land to cede. They had remained on the former reservation for fifteen years during the allotment impass, but without any rights of tribal ownership. That impass was now broken in reliance on, not in derogation of, the cession made under the Act of 1880.

C. THE COURTS, GOVERNMENT COUNSEL AND INDIAN COUNSEL HAVE CONSISTENTLY UNDERSTOOD AND STATED THAT THE ACT OF 1880 CEDED THE ENTIRE UTE RESERVATION AS IT THEN EXISTED

The Court of Claims appeared to act upon the hypothesis that reasonable men might not have thought that in referring to the Act of 1880 the settlement agreement included a reference to the southernmost part of the then Ute Reservation. But until this lawsuit was filed, three days before the closing of the Indian Claims Commission docket, both the courts and concerned attorneys were unanimous that the Act of

1880 worked a cession of the whole of the Ute Reservation.

The various occasions on which such statements were made, including to this Court, are set out at length in the Statement, *supra*, pp. 10–13. Not all of them were mere *dicta*: in 1910, there was an award of more than $170,000, out of a total judgment of $3,400,000, attributable to Southern Ute lands. *The Ute Indians* v. *United States*, 45 Ct. Cl. 440. And in 1947 in this Court, with counsel on both sides essentially the same as those who later reached settlement in 1950, it was said that—

> except for certain treaty lands not at issue here, *litigation concerning which is now pending in the Court of Claims*, the *only* lands in Colorado for which the Indians have not been paid are those to the north of and outside the 1868 treaty reservation * * *.
>
> * * * * *
>
> It is conceded that petitioners [the Confederated Band] have either been, or are currently pressing litigation in the Court of Claims by which they seek to be, compensated for the White River Valley Lands, and, in fact, *for all of the land which was contained in the true boundaries of the 1868 reservation.* * * *

Confederated Bands of Ute Indians v. *United States*, 330 U.S. 169, 175, 176. (Emphasis added.) The litigation referred to, of course, is that which was settled in 1950 in the language whose meaning is at issue here. Counsel's repeated insistence in this Court in 1947 that the Act of 1880 ceded the entire Ute Reser-

vation has already been noted, and was part of the *factum* against which the settlement agreement was reached. *Supra,* pp. 11–12.

D. SINCE THE MEANING OF THE REFERENCE TO THE ACT OF 1880 WAS CLEAR AND REASONABLE IN LIGHT OF PAST STATEMENTS BY COUNSEL AND THE COURTS, IT WAS IMPROPER TO ENTERTAIN PAROLE EVIDENCE TO SHOW A DIFFERENT MEANING

If one begins, as is proper, by asking how government counsel could have assured himself that the 1950 settlement agreement brought an end to litigation over the government's obligations regarding the former Ute Reservation, it is difficult to disagree with Judge Skelton, dissenting below, that "a more clear, a more precise, a more final disposal and release of claims" than that signed in 1950 could not readily be imagined (App. 99). The judgment's reference to "land * * * ceded to defendant by the Act of June 15, 1880," particularly in the context of the settled understanding of that act which had arisen between the same parties and counsel in prior litigation, is too clear to admit of doubt as to the parties' intent. Consequently, all elements of the claims made in this case are barred by *res judicata*; for the 1950 judgment is not subject to collateral attack save for lack of actual consent or fraud in the procurement, and bars all further litigation concerning the identified lands. *Swift & Co.* v. *United States,* 276 U.S. 311, 324; *Commissioner* v. *Sunnen,* 333 U.S. 591; *Cromwell* v. *County of Sac,* 94 U.S. 351.[5]

[5] The fact that this is a consent judgment, rather than a contested one, does not alter the result, *Swift & Co.* v. *United States, supra; United States* v. *Swift & Co.,* 286 U.S. 106; *Rector* v. *Suncrest Lumber Co.,* 52 F. 2d 946 (C.A. 4).

When the *res judicata* argument was first made to the Court of Claims, it remanded the matter to the Commission to "get a better idea of exactly what the parties meant to stipulate in 1950, namely what they *then* thought was ceded by the Act of 1880" (App. 86). The Tribe introduced the testimony of Ernest Wilkinson, who was the attorney in the previous litigation and who signed the stipulation of settlement, not only in Case No. 46640, but in all of these cases. The government offered no evidence, on the theory that a stipulated judgment could not be impeached by parol evidence. The majority opinion of the court seemed to take great offense because the government refused to open its files to Mr. Sonosky, the former attorney with the Department of Justice who handled the *Ute* cases and settlement, "for the purpose of refresh[ing] his memory" (App. 87). Because of this refusal, the majority concluded: "We think we are justified in inferring that neither party intended the stipulation to apply to [the southern strip of the reservation]" (App. 88).

Not only the conclusion, but the entire inquiry was unwarranted. There was no suggestion, and no finding, that the language in question had been procured by fraud, or had not actually been consented to. See *Swift & Co.* v. *United States, supra.* The judgment based on the stipulation was the act of the court, and has the same force and effect as all judgments. *Nashville, Chattanooga & St. Louis Ry. Co.* v. *United States,* 113 U.S. 261; *National Labor Relations Board* v. *Ochoa Fertilizer Corp.,* 368 U.S. 318, 323.

> * * * Plaintiffs cannot be allowed a showing that defendant intended to acquire something less than what the judicial records establish. It is well settled that parol or extrinsic evidence is inadmissible, in a collateral proceeding, to vary or contradict judicial records, orders or decrees. *Hill* v. *Wampler,* 298 U.S. 460 (1936); *In Re Union League Club of Chicago,* 203 F. 2d 381 (1953); *In Re Crosby Stores,* 65 F. 2d 360 (1933).

Lillie H. Mason, et al. v. *United States,* 144 Ct. Cl. 579, 583–584; see, also, *Utah Power & Light Co.* v. *United States,* 70 Ct. Cl. 391, 397–398.

Nor was it proper to approach the stipulation, as the court did, looking to find a tortuous route around its primary and long-accepted reference.

> Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical and close construction. The general language "all and all manner of debts," etc., indicates a purpose to make an ending of every matter arising under or by virtue of the contract. If parties intend to leave some things open and unsettled their intent so to do should be made manifest. Here was a contract involving three millions of dollars, and after the work was done, the vessel delivered and accepted and this release entered, claims are presented amounting to over $500,000. Surely the parties never intended to leave such a bulk of unsettled matters. * * *

United States v. *Wm. Cramp & Sons Co.,* 206 U.S. 118, 128. As the Court of Claims itself has recognized,

> * * * A claim not specifically delineated in an exception to a release is hereafter barred.

H.L.C. & Associates Constr. Co. v. *United States,* 176 Ct. Cl. 285, 290–95, 367 F. 2d 586, 588–93 (1966); *Utah Constr. & Mining Co.* v. *United States,* 168 Ct. Cl. 522, 535, 339 F. 2d 606, 614, (1914), *rev'd on other grounds,* 384 U.S. 394 (1966).

John G. Vann v. *The United States,* 190 Ct. Cl. 546, 555. And so it is here. Had the parties intended to leave out of any settlement a claim for some 230,000 acres of land, the stipulation would have said so.[6]

II. TO THE EXTENT RESPONDENT'S EXCEPTIONS TO THE GOVERNMENT'S ACCOUNTING FOR FUNDS DERIVED FROM THE SALE OF 82,000 ACRES OF LAND SEEK AN ACCOUNTING FOR OTHER FUNDS, OR FOR THE GOVERNMENT'S FISCAL CONDUCT AFTER AUGUST 13, 1946, ITS EXCEPTIONS ARE BARRED BY THE JURISDICTIONAL LIMITATIONS ON THE AUTHORITY OF THE INDIAN CLAIMS COMMISSION

The Tribe's petition before the Indian Claims Commission, filed only three days before the deadline established by the Commission's governing statute,

[6] During the past 20 years, the government has made full and complete settlements with Indian Tribes under the Indian Claims Commission Act in 91 cases, for an aggregate consideration of $181,533,833.33, all of which have received the approval of the Indian Claims Commission as required by Section 15 of that Act (25 U.S.C. 70n), and are entered as judgments against the United States. If these stipulated judgments may be upset in some future proceeding, because the attorney for the Tribe says that he did not "intend" to include a particular claim in the settlement, the whole procedure for settlement of Indian claims which Congress has established will be seriously jeopardized.

made only one, limited claim for an accounting. It sought a proper accounting for the funds received by the United States from the disposal of approximately 82,000 acres of land (App. 12–13). The government supplied such an accounting, current to 1951, in February 1953. Ten years later, however, twelve years after the Commission's authority to entertain new claims had lapsed, the Tribe sought by belated exceptions to the accounting to expand the government's accounting obligation in two respects: first, by raising accounting claims unrelated to the 82,000 acres referred to in the original petition; second, by requiring the accounting to be brought up to date from 1951, the terminal date. By permitting both exceptions, the Court of Claims and the Commission radically expanded the Commission's authority, in plain derogation of Congress' will.

Since its inception in 1946, it has been plain that the Indian Claims Commission is a body of sharply limited jurisdictional authority. It is permitted to entertain only claims "existing" before August 13, 1946; all subsequent claims are within the original jurisdiction of the Court of Claims. 25 U.S.C. 70a; 28 U.S.C. 1505. And it is permitted to entertain only claims which were the subject of a complaint filed on or before August 13, 1951. 25 U.S.C. 70k. The holdings below honor neither restriction.

A. THE CLAIM FOR AN ACCOUNTING OF TRIBAL FUNDS UNRELATED TO THE 82,000 ACRES REFERRED TO IN THE ORIGINAL PETITION IS UNTIMELY

The government contended below, and both the Commission and the Court of Claims appear to have

agreed, that respondent's exceptions to the government's accounting sought an accounting (and consequent payment of damages) for funds unrelated to the 82,000 acres of land on which the claim for accounting in respondent's complaint was based. For example, amended Exception 8, filed on September 30, 1963, states (App. 22):

> 8. Petitioner excepts to the failure of defendant to credit interest at the rate of 5% on petitioner's tribal fund: Indian moneys, Proceeds of Labor, Southern Ute Indians, and to the failure to show the amount of money lost to petitioner through the failure to credit interest as required by law.

The text and a footnote explain that counsel for respondent had discovered this fund more or less by chance in the course of other litigation. There is no suggestion that it relates to the funds derived from the 82,000 acres which were the only subject of the original demand for an accounting. And, indeed, funds in a "Proceeds of Labor" account could not ordinarily be expected to have been derived from the government's sale of land.[1]

[1] Such a fund would ordinarily contain the proceeds of any products made, harvested, or otherwise produced and then sold from the reservation. So far as respondent's exceptions concern the fund called "Proceeds of Southern Ute Reservation," matters are more complicated. That is a general fund which contains tribal funds in addition to the proceeds of the 82,000 acres, and is not segregated. Strictly speaking, respondents are entitled to recover by their exceptions only that proportion of any mishandling shown by the accounting as is attributable to the proceeds of the 82,000 acres specified. That issue, however, is one this Court need not decide; we urge here only that

Nothing prevented the Tribe from seeking a general accounting from the government when it filed its original petition in 1951. This is not a case involving inexperienced lawyers who might have "overlooked" the matter, nor was it a case of lawyers unfamiliar with Ute affairs. The attorneys presently representing the Utes are the same ones who previously and successfully represented the Confederated Utes (including the Southern Utes) in securing four judgments for that Tribe aggregating almost 32 million dollars in 1950 (App. 97). It should be assumed, therefore, that their action in seeking only an accounting for a specific item was knowledgeable and deliberate.

But the authority of the Indian Claims Commission to entertain a new demand for an accounting expired on August 13, 1951, twelve years before this "exception" was filed. 25 U.S.C. 70k. The limitation of Section 70k is jurisdictional, since the Act is a waiver of sovereign immunity. As in the case of the Tucker Act, 28 U.S.C. 1346, 2401, 2501, limitations on the time for filing suit under a waiver of sovereign immunity are jurisdictional in nature. "The United States, as sovereign, is immune from suit save as it consents to be sued * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586. See also, *United States* v. *Shaw*, 309 U.S. 495; *United States* v. *U.S. Fidelity Co.*, 309 U.S. 506; *Soriano* v. *United States*, 352 U.S. 270; *Edwards*

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the expansive reading of the relation[illegible]ck theory be rejected, and the case remanded for further proceedings in which such questions may be examined, and the precise identification of any exceptions which do properly relate back may occur.

v. *United States*, 163 F. 2d 268 (C.A. 9); *Powers* v. *United States*, 390 F. 2d 602 (C.A. 9); *Hamman* v. *United States*, 399 F. 2d 673 (C.A. 9); *Eastern Freight Ways* v. *United States*, 257 F. 2d 703 (C.A. 2); *Mulholland* v. *United States*, 361 F. 2d 237 (Ct. Cl.); *Todd* v. *United States*, 292 F. 2d 841 (Ct. Cl.). It follows that the court erred in directing the accounting for such claims to be made.

It is quite clear from the legislative history of the Act that Congress was fully aware of the time limitation for filing claims and adopted it knowingly and intentionally. From the first bill introduced in 1930, throughout all successive stages of the legislation, the period for filing claims was always five years.[8]

At hearings on H.R. 1198 and 1341, 79th Congress, which were the forerunners of H.R. 4497, the eventual Indian Claims Commission Act, the House Committee

[8] The legislative history of the Indian Claims Commission Act has been compiled in convenient form in *Legislative Material on the Indian Claims Commission Act of 1946* by Alice Ehrenfeld associated with Riegelman, Strasser, Schwarz and Spiegelberg, and Robert W. Barker, associated with Ernest L. Wilkinson. It will be cited as *Legislative Material*.

H.R. 7963, 71st Cong., 2d Sess., Jan. 6, 1930, sec. 4(f), (*Legislative Material*, 15); H.R. 6655, 74th Cong., 1st Sess., sec. 4 (*id.*, 68); S. 2731, 74th Cong., 1st Sess., sec. 4 (*id.*, 104); S. 1902, 75th Cong., 1st Sess., sec. 4 (*id.*, 147); H.R. 5817, 75th Cong., 1st Sess., sec. 4 (*id.*, 206); S. 4206, 76th Cong., 3d Sess., sec. 4 (*id.*, 336); S. 4234, 76th Cong., 3d Sess., sec. 13 (*id.*, 347); S. 4349, 76th Cong., 3d Sess., sec. 13 (*id.*, 365); S. 1111, 77th Cong., 1st Sess., sec. 13 (*id.*, 395); H.R. 4339, 77th Cong., 1st Sess., sec. 13 (*id.*, 430); H.R. 4693, 78th Cong., 2d Sess., sec. 13 (*id.*, 444); H.R. 5569, 78th Cong., 2d Sess., sec. 12 (*id.*, 464); H.R. 1198, 1341, 79th Cong., 1st Sess., sec. 12 (*id.*, 472, 473); H.R. 4497, 79th Cong., 1st Sess., sec. 12 (*id.* 565).

had before it Mr. Lynn Adams, Special Attorney for the Chickasaw Indians, who stated in answer to a question concerning the five-year period: [9]

> Five years from the date of the passage of the Act. There should be some time to force them to come in and present their claims.

When H.R. 1198 was before the House Committee, the Department of the Interior drafted various amendments. One concerned the statutory period for bringing suit. Mr. Felix Cohen, Associate Solicitor, presented the amendments. Interior suggested striking out the words "all claims shall be forever barred; not presented before the end of said five-year period" and substituting: [10]

> No claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be considered by the Congress.

This is the language which finally appeared in the Act.

The Indian Claims Commission made a frontal assault on this language when the propriety of respondent's exceptions was challenged there. It reasoned that since the tribe could not have known of the basis for the exceptions until the government had filed its report in 1953, the limitation period had not begun to run. Such reasoning might have sustained a suit brought in the Court of Claims, which has original jurisdiction over all claims "existing" after August 13,

[9] Hearings, House Committee on Indian Affairs, 1945, p. 9; *Legislative Material*, p. 475.

[10] Hearings, p. 120; *Legislative Material*, p. 530.

1946, since the existence of a claim is sometimes equated with the (reasonable) discovery of it in the law. Even then, the Court of Claims' limitation period of six years might be thought to have run by 1963, when the exceptions were filed. But the theory, admitting the newness of the claim, flies directly in the face of Section 70k, which requires that claims before the Indian Claims Commission must have been filed by 1951.

The Court of Claims disclaimed this "novel rationale" (App. 95), but upheld the "exceptions"—admitting their broader scope—as "amendments" to the petition which, under the Commission's Rule 13(c), would "relate back" to the time of the original filing. While it recognized the limited scope of the original request for an accounting, it found that the government's response indicated an awareness that such a broadening of inquiry was likely, since the response included more information than was required to answer the specific allegations of the petition. (App. 96).

But, as has already been pointed out, if respondent had wished a broader, general accounting their counsel could have demanded one. And there is no justification for the court's conclusion that the government knew all along that such an accounting was required. Indian accounting reports are compiled by accountants in the General Accounting Office. They are not lawyers. They included such information as they thought was necessary to answer the specific demand for an accounting made. They followed a form adopted many years ago and apparently made no

differentiation in this particular case.[11] They included data up to June 30, 1951, as they do in all cases simply because this is the last date for which they have any records. The records for later dates are scattered in the various "Records Centers" throughout the United States. The fact that the report may have included more information than was actually necessary thus did not in any way indicate that "defendant knew from the outset" that it would have to submit information from which a general accounting could be demanded.[12]

The court's application of the "relation back" theory is equally unfounded. Commission Rule 13(c), which permits amended pleadings to relate back to the date of an original filing, is similar to Rule 15(c) of the Federal Rules of Civil Procedure. Interpretations of the latter rule, liberal as it is, have generally agreed that it does not permit the filing of a new and different claim after the running of the statute of limitations. 3 Moore, *Federal Practice* ¶ 15.15, p. 1041 n. 6 and cases cited; Barron & Holtzoff, *Federal Practice and Procedure* § 448 (1960); *L. E. Whitham*

[11] The attorney for the government recognized that the report included extraneous matter and attempted to restrict the report to that necessary to respond to the petition. The court below stated that this attempt was "specious" (App. 96).

[12] It is equally fallacious to suggest, as the court did, that the government's failure to contest the substance of the exceptions "underscores its concession to the obviousness of its fiduciary misconduct disclosed in the report" (App. 96). The government made no response to the "substance" because it contended that the matter of a general accouning was beyond the jurisdiction of the Commission. The Commission recognized this in its opinion, saying, "It should be noted at this point that defendant rested its defense entirely upon other grounds and has not yet answered or contested these exceptions" (App. 47).

Const. Co. v. *Remer*, 105 F. 2d 371, 375–376 (C.A. 10); *Hammond-Knowlton* v. *United States*, 121 F. 2d 192 (C.A. 2), certiorari denied, 314 U.S. 694; *Hartmann* v. *Time*, 64 F. Supp. 671, 680 (E.D. Pa.). To be sure, whether a claim is "new and different' 'is a question of judgment. But here, as in two prior decisions on which the court below relied.[13] the novelty of the issues sought

[13] In *Snoqualmie Tribe* v. *United States*, 178 Ct. Cl. 570, 372 F. 2d 951, the court permitted the petitioner to add a claim on behalf of the Skykomish Tribe of Indians, which had not previously filed a claim with the Commission. The original plaintiffs had relied on a particular treaty as giving rise to their claim; the same treaty, the court reasoned, was at the root of the Skykomish Tribe's claims, and therefore in its view the government had received adequate notice of the "possibility that it might have to defend against a broader claim." 178 Ct. Cl. at 588, 372 F. 2d at 961.

Similarly, in *United States* v. *Northern Paiute Nation*, 183 Ct. Claims 321, 393 F. 2d 786, the Mono Band of Paiute Indians had not subscribed to the Nation's complaint before the Commission within the statutory time. When the Nation sought to amend its complaint in 1958, that was allowed on the basis that the Mono Band was clearly a Northern Paiute tribe. "Therefore the timely petition did include the Monos as a party to the suit." 183 Ct. Cl. at 329; 393 F. 2d at 790.

The inadequacy of the reasoning in these cases is shown, however, in the court's holding with respect to another aspect of the present case. As previously noted (n. 1 *supra*), the "Southern Ute Tribe or Band" in this case excludes a tribe that was consistently treated as a member of the Southern Ute Tribe or Band when the Acts of 1880 and 1895 were passed, the Weeminuche, and the government resisted this action in part on the failure to join that tribe as, in our view, an indispensable party. The Court of Claims ruled against the government on the ground that, since they did not join, the Weeminuche's claim was extinguished on August 13, 1951, when the statute of limitations ran; that tribe then ceased to be indispensable (App. 89). This was a proper application of the statute of limita-

to be added cannot be escaped. The claim for an accounting of a fund identified as "Proceeds of Labor" cannot reasonably be thought to be implicit in a claim limited to a "failure to account for the proceeds from the sale of approximately 81,953.18 acres" (App. 13). Whether or not the claim was suggested by the government's response, or "ignoble confessions," in connection with the accounting it made in 1953—and the lapse of ten years from the filing of the report to the filing of the exceptions makes even that hypothesis untenable—the claim was in no wise suggested by what the Band demanded before the running of the limitations period. Only the latter consideration should be the test of whether respondent's new claims relate back to its earlier filing. Otherwise the Commission's procedural rule would effectively supersede the explicit limitation on its jurisdiction enacted into law by Congress.

Finally, reasonable enforcement of the statute of limitations is particularly called for here, since there can be no doubt of Congress' purpose to bring proceedings before the Indian Claims Commission to a prompt end. The Commission's life was originally limited to ten years. 25 U.S.C. 70v. While this period has been extended in five-year intervals as required, 70 Stat. 624; 75 Stat. 92; 81 Stat. 11, to its present expiration date of April 10, 1972, there is an evident and growing sense of congressional impatience with the slowness with which the Commission's work has

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tions—and completely contrary to the result reached in *Snoqualmie* and *Northern Paiute*. Under those two decisions it would have to be reasoned that a claim on behalf of the Weeminuche could still be made.

been accomplished. The most recent extension was made under threat that no further extensions would be forthcoming, H. Rep. No. 132, 90th Cong., 1st Sess. 3; S. Rep. No. 72, 90th Cong., 1st Sess. 4; H. Conf. Rep. No. 179, 90th Cong., 1st Sess. 4, and included an extraordinary provision threatening forfeiture of Indian claims if the claimants did not proceed to trial on the date set by the Commission for that purpose. 25 U.S.C. (Supp. V) 70v–1(b). In these circumstances, an expansive interpretation of the "relation back" theory to permit belated amendment of claims to raise new issues is particularly inappropriate.

> The jurisdiction of the lower court was limited to claims sued on before the expiration of the period within which the United States consented to be sued. It did not extend to any cause of action which was not alleged in plaintiff's original petition. As the United States may not be sued without its consent, causes of action not alleged within the period allowed may not be enforced. *Finn* v. *United States,* 123 U.S. 227, 232. The amended petition was not filed within the time allowed; no cause of action was by it brought within the power of the court. *Taylor Co.* v. *Anderson,* 275 U.S. 431, 438–439. *B. & O.S.W. R. Co.* v. *Carroll,* 280 U.S. 491, 495. * * *

United States v. *Seminole Nation,* 299 U.S. 417, 421–422; see, also, *Seminole Nation* v. *United States,* 316 U.S. 286, 288–289.

B. THE CLAIM TO HAVE THE ACCOUNTING BROUGHT UP TO DATE FALLS OUTSIDE THE INDIAN CLAIM COMMISSION'S JURISDICTIONAL AUTHORITY

The statute establishing the Indian Claims Commission expressly provides that "No claim accruing after August 13, 1946, shall be considered by the Commission." 25 U.S.C. 70a. Such claims are not foreclosed, but must be brought under the original jurisdiction of the Court of Claims, which is given jurisdiction "of any [Indian] claim against the United States accruing after August 13, 1946 * * *." 28 U.S.C. 1505. Respondent successfully argued below that it was entitled to have the government produce, and the Indian Claims Commission consider, an accounting for the government's handling of its funds between July 1, 1951, and the present. In holding for respondent, the Commission and the court plainly exceeded the authority conferred by Section 70a.

A claim for an accounting is not the same as a claim for interest on damages for wrongdoing which occurred at a certain time. To the extent the government wronged the Southern Ute Tribe before August 13, 1946, and those injuries have not since been settled, respondent is entitled both to damages for the injury and any increase allowed by law and warranted by the passage of time, up to the very moment of judgment. But an accounting, by reviewing the manner in which the government has handled tribal funds, seeks to expose *new* instances of wrongdoing possibly entitling the claimant to an additional measure of relief. Section 70a flatly denies the Commission authority to consider any such additional causes of action ac-

cruing after August 13, 1946, and places jurisdiction over them in the Court of Claims. Respondent's exception demanding an accounting since 1951 (App. 22) could only involve such matters. The failure of the Tribe to file a claim in the Court of Claims can not justify such an extension of the Commission's limited jurisdiction—again, particularly in view of Congress' repeated insistence upon those limitations.

It is true that, as has been the consistent practice, the accounting in this case was made current until June 30, 1951, rather than August 13, 1946. Many of the judgments entered by the Commission have doubtless involved adjustments for wrongdoings in the 1946–1951 period thus revealed. These adjustments, too, are outside the authority of the Commission to make. *United States* v. *Corrick,* 298 U.S. 435, 440. Perhaps they may be explained as the product of confusion between the statutory limitation on when claims must arise, Section 70a, and the limitation period governing when claims must be filed, Section 70k. It was convenient to select some appropriate closing date, and that wrongful choice having been made and acted upon over the years, the government will continue to honor it even though strictly speaking the resulting judgments are, to a slight extent, without juridical force.

The situation here is dramatically different. What is sought is a new accounting enterprise, covering a period entirely excluded from the Commission's authority and now twenty years long. All but two of the accounting reports prepared for the Commission bear a uniform closing date of June 30, 1951. Yet 44 claims

for a general accounting remain pending before the Commission; others which have already been closed might be reopened. To hold that the period from 1951 to the present must also be accounted for in these cases would expand the Commission's work far beyond Congress' intention.[14]

CONCLUSION

The decision of the Court of Claims should be reversed, and that court should be ordered to direct the dismissal of the complaint as barred by *res judicata*. In the alternative, the court should be instructed to order dismissal of that portion of respondent's exceptions to the government's accounting which presents issues not implicit in the request for an accounting of proceeds from the sale of approximately 81,953.18 acres of land or which requires that the accounting made be brought up to date.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
PETER L. STRAUSS,
Assistant to the Solicitor General.
EDMUND B. CLARK,
RALPH A. BARNEY,
Attorneys.

JANUARY 1971.

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[14] It has been estimated that 224 man-years of labor would be required to bring the *pending* general accountings claims from their present closing in 1951 to 1969. Hearings on the Status of Indian Claims Litigation, Senate Committee on Interior and Insular Affairs, 91st Cong., 2d Sess. (April 10, 1970) 54.

APPENDIX

Act of June 15, 1880, 21 Stat. 199, *et seq.*:

CHAP. 223.—An act to accept and ratify the agreement submitted by the confederated bands of Ute Indians in Colorado, for the sale of their reservation in said State, and for other purposes, and to make the necessary appropriations for carrying out the same.

Whereas certain of the chiefs and headmen of the confederated bands of the Ute tribe of Indians, now present in the city of Washington, have agreed upon and submitted to the Secretary of the Interior an agreement for the sale to the United States of their present reservation in the State of Colorado, their settlement upon lands in severalty, and for other purposes; and

Whereas the President of the United States has submitted said agreement, with his approval of the same, to the Congress of the United States for acceptance and ratification, and for the necessary legislation to carry the same into effect: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same is hereby, accepted, ratified, and confirmed: * * * *And provided also,* That three-fourths of the adult male members of said confederated bands shall agree to and sign said agreement, upon presentation of the same to

them, in open council, in the manner hereinafter provided: * * *

The chiefs and headmen of the confederate [*sic*] bands of the Utes now present in Washington, hereby promise and agree to procure the surrender, to the United States, for trial and punishment, if found guilty, of those members of their nation, not yet in the custody of the United States, who were implicated in the murder of United States Indian Agent N. C. Meeker and the murder of and outrages upon the employees at the White River Agency on the twenty-ninth day of September, eighteen hundred and seventy-nine, and in case they do not themselves succeed in apprehending the said parties, presumably guilty of the above-mentioned crime, that they will not in any manner obstruct, but faithfully aid, any officers of the United States, directed by the proper authorities, to apprehend such presumably guilty parties.

The said chiefs and headmen of the confederated bands of Utes also agree and promise to use their best endeavors with their people to procure their consent to cede to the United States all the territory of the present Ute Reservation in Colorado, except as hereinafter provided for their settlement.

The Southern Utes agree to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico.

The Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity and in the Territory of Utah.

The White River Utes agree to remove to and settle upon agricultural lands on the Uintah Reservation in Utah.

Allotments in severalty of said lands shall be made as follows:

To each head of a family one-quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section.

To each single person over eighteen years of age one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section.

To each orphan child under eighteen years of age one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; and to each other person, under eighteen years, now living, or who may be born prior to said allotments, one-eighth of a section, with a like quantity of grazing land.

* * * * *

The said chiefs and headmen of the confederated bands of Utes promise to obtain the consent of their people to the cession of the territory of their reservation as above on the following express conditions:

First. That the Government of the United States cause the lands so set apart to be properly surveyed and to be divided among the said

Indians in severalty in the proportion hereinbefore mentioned, and to issue patents in fee simple to them respectively therefor, so soon as the necessary laws are passed by Congress. * * *

Second. That so soon as the consent of the several tribes of the Ute Nation shall have been obtained to the provisions of this agreement, * * * a commission shall be sent to superintend the removal and settlement of the Utes, and to see that they are well provided with agricultural and pastoral lands sufficient for their future support * * *.

Third. That in consideration of the cession of territory to be made by the said confederated bands of the Ute Nation, the United States, in addition to the annuities and sums for provisions and clothing stipulated and provided for in existing treaties and laws, agrees to set apart and hold, as a perpetual trust for the said Ute Indians, a sum of money, or its equivalent in bonds of the United States, which shall be sufficient to produce the sum of fifty thousand dollars per annum, which sum of fifty thousand dollars shall be distributed per capita to them annually forever.

* * * * *

SEC. 3. That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed, under the direction of said commissioners, a sufficient quantity of land in the vicinities named in said agreement, to secure the settlement in severalty of said Indians as therein provided. And upon the completion of said survey and enumeration herein required, the said commissioners shall cause allotments of lands to be made to each and all of the said

Indians, in quantity and character as set forth in the agreement above mentioned, and whenever the report and proceedings of said commissioners, as required by this act, are approved by the President of the United States, he shall cause patents to issue to each and every allottee for the lands so allotted, with the same conditions, restrictions and limitations mentioned therein as are provided in said agreement; and all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided,* That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion here-

inbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this act * * *.

SEC. 10. If the agreement as amended in this act is not ratified by three-fourths of the adult male Indians of the Ute tribe within four months from the approval of this act the same shall cease to be of effect after that day.

Approved June 15, 1880.

Act of February 20, 1895, 28 Stat. 677 *et seq.*:

CHAP. 113.—An Act To disapprove the treaty heretofore made with the Southern Ute Indians to be removed to the Territory of Utah, and providing for settling them down in severalty where they may so elect and are qualified, and to settle all those not electing to take lands in severalty on the west forty miles of present reservation and in portions of New Mexico, and for other purposes, and to carry out the provisions of the treaty with said Indians June fifteenth, eighteen hundred and eighty

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the agreement made by J. Montgomery Smith, Thomas S. Childs, and R. B. Weaver, commissioners on the part of the United States, with the Southern Ute Indians of Colorado, bearing date November thirteenth, eighteen hundred and eighty-eight, be, and the same is hereby, annulled, and the treaty made with said Indians June fifteenth, eighteen hundred and eighty, be carried out as herein provided, and as further provided by general law for settling Indians in severalty.

SEC. 2. That within six months after the passage of this Act the Secretary of the Interior shall cause allotment of lands, in severalty, to be made to such of the Southern Ute Indians in Colorado as may elect and be considered by him qualified to take the same out of the agricultural lands embraced in their present reservation in Colorado, such allotments to be made in accordance with the provisions of the Act of Congress approved June fifteenth, eighteen hundred and eighty, entitled "An Act to accept and ratify the agreement submitted by the confederated bands of Ute Indians in Colorado for the sale of their reservation in said State, and for other purposes, and to make the necessary appropriations for carrying out the same," and the amendments thereto, as far as applicable hereto, and the treaties heretofore made with said Indians: *Provided*, That Indians taking allotments as herein provided shall retain their interest in all tribal property.

SEC. 3. That for the sole and exclusive use and occupancy of such of said Indians as may not elect or be deemed qualified to take allotments of land in severalty, as provided in the preceding section, there shall be, and is hereby, set apart and reserved all that portion of their present reservation lying west of the range line between ranges thirteen and fourteen west of the New Mexico principal meridian, and also all of townships thirty-one and thirty-two of ranges fourteen, fifteen, and sixteen west of the New Mexico principal meridian and lying in the Territory of New Mexico, subject, however, to the right of the Government to erect and maintain agency buildings thereon and to grant

rights of way through the same for railroads, irrigation ditches, highways, and other necessary purposes; and the Government shall maintain an agency at some suitable place on said lands so reserved.

SEC. 4. That at the expiration of six months from the passage of this Act the President of the United States shall issue his proclamation declaring the lands embraced within the present reservation of said Indians except such portions as may have been allotted or reserved under the provisions of the preceding sections of this Act, open to occupancy and settlement, and thereupon said lands shall be and become a part of the public domain of the United States, and shall be subject to entry under the desert, homestead, and town-site laws and the laws governing the disposal of coal, mineral, stone, and timber lands; but no homestead settler shall receive a title to any portion of such lands at less than one dollar and twenty-five cents per acre, and shall be required to make a cash payment of fifty cents per acre at the time filing is made upon any of said lands * * *.

* * * * *

SEC. 6. That the foregoing provisions of this Act shall take effect only upon the acceptance thereof and consent thereto by a majority of all the male adult Indians now located or residing upon the reservation, which acceptance shall be at once obtained under such regulations as the Secretary of the Interior may prescribe.

Approved, February 20, 1895.

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